

STATE OF MICHIGAN  
IN THE SUPREME COURT  
Appeal from the COURT OF APPEALS  
Owens, P.J., Jansen, and R.B. Burns J.J.

THE PEOPLE OF STATE OF MICHIGAN,  
Plaintiff-Appellee,

v

ERIC D. BOYD,  
Defendant-Appellant.

Supreme Court  
No. 118021

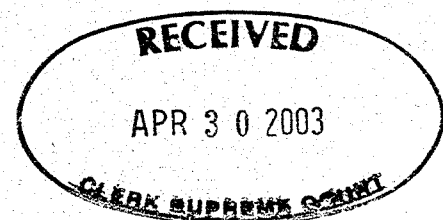
Third Circuit Court No. 97-05161  
Court of Appeals No. 214097

**PLAINTIFF-APPELLEE'S BRIEF ON APPEAL  
ORAL ARGUMENT REQUESTED**

MICHAEL E. DUGGAN  
Wayne County Prosecutor

TIMOTHY A. BAUGHMAN  
Chief, Research, Training  
and Appeals

TERRANCE K. BOYLE (P11086)  
Deputy Chief, Appeals  
1441 St. Antoine, 11<sup>th</sup> Floor  
Detroit, MI 48226  
(313) 224-5794



## Table of Contents

	<u>Page</u>
Index of Authorities .....	
Counterstatement of Appellate Jurisdiction .....	1
Counterstatement of Question Presented .....	2
Counterstatement of Facts and Proceedings .....	3
Argument .....	8
I.	
The Principles of <i>People v Finley</i> , which require defendant to testify and suffer impeachment by erroneously admitted evidence in order to preserve the error for appeal, ought to be applied where the erroneous ruling implicates federal constitutional rights contained within the Fifth and Fourteenth Amendments. ....	8
A. Summary of Argument .....	8
B. The Standard of review .....	10
C. The nature of the trial error and the nature of the alleged constitutional violation. ....	10
1. The Trial Error .....	12
2. The nature of the alleged constitutional violation .....	12
D. Why <i>Finley</i> principles should be applied .....	13
1. Non-occurrence of error .....	13
2. Any harm is speculative .....	13
3. Appellate review of the ruling .....	14
4. Appellate review of harmless error .....	15

E. Law in other jurisdictions .....	16
1. <i>Luce-Finley</i> .....	16
2. Extension of <i>Luce</i> .....	16
3. The other side .....	20
4. Proposed change to Federal Rules of Evidence .....	21
F. Fallacies in defendant's argument .....	22
1. The case law .....	22
2. Other arguments .....	25
G. A comparison of harms .....	27
H. Application of the new rule .....	29
I. State law .....	31
Relief .....	33

## TABLE OF AUTHORITIES

### FEDERAL CASES

Aleman v Sternes, 320 F.3d 687 (CA 7, 2003) .....	28
Arizona v Fulminante, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) .....	24
Biller v Lopes, 834 F.2d 41 (CA 2, 1987) .....	21
Brooks v Tennessee, 406 U.S. 605, 92 S. Ct. 1981, 32 L. Ed. 2d 358 (1972) .....	24, 25
Chevron Oil Co. v Huson, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971) .....	31
Doyle v Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) .....	PASSIM
Edwards v Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981) .....	18, 21
Fletcher v Weir, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982) .....	25
Greer v Miller, 483 U.S. 756, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987) .....	28
Griffin v California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) .....	21
Jenkins v Anderson, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980) .....	25
Luce v United States, 469 U.S. 38, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984) .....	13, 19
Mincey v Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978) .....	18
Miranda v Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) .....	4, 12, 17, 25
New Jersey v Portash, 440 U.S. 450, 59 L. Ed. 2d 501 (1979) .....	22, 23, 24

Ohler v United States, 529 U.S. 753, 120 S. Ct. 1851, 146 L. Ed. 2d 826 (2000)	14
Rock v Arkansas, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987)	12
United States v Chischilly, 30 F.3d 1144 (CA 9, 1994)	21
United States ex rel Adkins v Greer, 791 F.2d 590 (CA 7, 1986)	21
United States v Behanna, 814 F.2d 1318 (CA 9, 1987)	21
United States v Cook, 608 F.2d 1175 (CA 9, 1979)	30, 31
United States v DiMatteo, 759 F.2d 831 (CA 11, 1985)	17
United States v Hasting, 461 U.S. 499, 103 SCt 1974; 76 L. Ed. 2d 96 (1983)	27
United States v Johnson, 767 F.2d 1259 (CA 8, 1985)	17
United States v Sherwood, 98 F 3d 402 (CA 9, 1996)	21
United States v Weichert, 783 F.2d 23 (CA 2, 1986)	17

## STATE CASES

Accord State v LaRose, 127 N.H. 146, 497 A.2d 1224 (1985)	19
Bailey v United States, 699 A.2d 392 (DC App 1997)	17
Jordan v State, 591 A.2d, 875 (Md., 1991)	19
People v Bobo, 390 Mich. 355, 212 N.W.2d 190 (1973)	25

People v Carines, 460 Mich. 750; 597 NW2d 130 (1999) .....	7, 10
People v Cetlinski, 435 Mich. 742 (1990) .....	25
People v Dennis, 464 Mich. 567 (2001) .....	7, 29
People v Finley, 431 Mich. 506; 431 N.W.2d 19 (1988) .....	PASSIM
People v Lukity, 460 Mich. 484 (1990) .....	10
People v Nixon, 421 Mich. 79, 364 N.W.2d 593 (1984) .....	31
People v Rice (On Remand), 235 Mich. App. 429; 597 N.W.2d 130 (1999) .....	6
People v Sierb, 456 Mich. 519 (1998) .....	10
People v Wakeford, 418 Mich. 95, 341 N.W.2d 68 (1983) .....	31
State v Brings Plenty, 459 N.W.2d 390 (SD, 1990) .....	20
State v Bruneau, 552 A.2d 585 (NH, 1988) .....	18
State v Brunelle, 534 A.2d 198 (VT, 1987) .....	20
State v Conner, 786 P.2d 948 (Ariz 1990) .....	17
State v Conde, 846 P.2d 843 (Ariz, 1992) .....	18
State v Hunt, 123 N.C. App. 762, 475 S.E.2d 722 (1996) .....	16
State v Koveos, 732 A.2d 722 (VT, 1999) .....	17

State v Lamb, 84 N.C. App. 569, 353 S.E.2d 857 (1987) .....	PASSIM
State v Raydo, 713 So. 2d 996 (Fla, 1998) .....	15

## COURT RULES AND RULES OF EVIDENCE

FRE 608(b) .....	17
FRE 404(b) .....	17
VRE 404(b) .....	17
MRE 103(a) .....	31
MCR 2.613(A) .....	32

## STATUTES

MCL 769.26 .....	31
------------------	----

## MISCELLANEOUS

"Procedural Rules Governing the Admissibility of Evidence," 54 Okla. L. Rev. 513, 518-519 (2001) .....	16
Westen & Mandell, To Talk To Balk, or to Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response." 19 Am. Crim. L. Rev. 521, 552 (1982) .....	18

## **STATEMENT OF APPELLATE JURISDICTION**

The People do not contest jurisdiction for purposes of this brief on appeal.

## COUNTERSTATEMENT OF QUESTION PRESENTED

### I.

**Whether the principles of *People v Finley*, which require defendant to testify and suffer impeachment by erroneously admitted evidence in order to preserve the error for appeal, ought to be applied where the erroneous ruling implicates federal constitutional rights contained within the Fifth and Fourteenth Amendments.**

**The People answer: "Yes"**

**Defendant answers: "No"**

## COUNTERSTATEMENT OF FACTS AND PROCEEDINGS

Defendant was charged with criminal sexual conduct in the first degree for the rape of Shanita Peoples, a female under the age of thirteen, on June 14, 1997.

The victim testified to the details of this forcible rape.<sup>1</sup> A report was made immediately to Mary Chaney, an 11-year old friend with whom she was staying who testified that the victim was crying, her clothes were messed up, she was missing a pair of shorts, and later, she could not continue to ride her bike because "her vagina was hurting."<sup>2</sup>

The victim refused to tell her father about the rape because she feared that harm would come to him from defendant.<sup>3</sup> Ultimately, she told her father a week later,<sup>4</sup> and her father called the police.<sup>5</sup>

Later, the victim informed her father that defendant was at the rear of their residence, and when the father attempted to talk to him, he ran away.<sup>6</sup>

Defendant was shortly thereafter arrested, and en route, said to the officers, "for real, how much time am I looking at?"<sup>7</sup>

---

<sup>1</sup>24b-36b.

<sup>2</sup>37b-40b.

<sup>3</sup>34b and 39b.

<sup>4</sup>43b-44b.

<sup>5</sup>41b.

<sup>6</sup>46b.

<sup>7</sup>48b.

The victim was not examined medically until eight days after the assault. The results of the examination were inconclusive on the issue of penetration due to lapse of time.<sup>8</sup>

On the morning of April 13, 1998, the date set for jury trial with the jury waiting outside the courtroom, defense counsel raised a question as to a statement made by defendant. There was no claim of improper police conduct. The last question was, "when you last saw her, how many times did you have sex with her?" Defendant's response was, "I am taking the fifth on that one." That ended all interrogation.<sup>9</sup>

Defense counsel argued that the statement could not be put before the jury because it would be using defendant's silence against him.<sup>10</sup>

The prosecutor argued erroneously that since defendant, fully apprised of *Miranda* rights, had elected to waive them, his statement six questions later ought to be admissible.<sup>11</sup>

The trial court agreed with the prosecutor and ruled the statement admissible erroneously.<sup>12</sup>

Nothing more is contained in the record about this matter. The jury had no knowledge of it. The statement was never admitted into evidence. No reference was made to it in argument.

Three days later, on Thursday, April 16, the prosecutor, immediately before resting her case, received from defense counsel a waiver of the production of the remaining witnesses, all police

---

<sup>8</sup>76b-23b

<sup>9</sup>1b.

<sup>10</sup>1b.

<sup>11</sup>2b.

<sup>12</sup>3b-6b.

officers, including officer Lena Edwards, the officer who had "Mirandized" defendant and taken his statement. The following colloquy occurred:<sup>13</sup>

MR. KINNEY: Yes, I have had that conversation with her. I do believe they will be cumulative. I've talked to Mr. Boyd about it and he agrees to waive. Is that correct, Mr. Boyd?

THE DEFENDANT: Correct.

MR. KINNEY: So we don't need their testimony.

THE COURT: Okay, fine.

Defense counsel requested the lunchtime recess to decide whether to call witnesses. After lunch, defense counsel stated: "yes, I had a conversation with my client. I told him that we don't have to put on a defense. But there is his brother, his brother was there, and he wants his brother to testify."<sup>14</sup>

Later, the following is reported:<sup>15</sup>

THE COURT: Okay. So the only testimony at least to this point that we're gonna have, if any, would be his testimony. (Defendant's brother).

THE KINNEY: That's all I'm asking him about, Judge.

Is that correct?

THE DEFENDANT: Yes

---

<sup>13</sup>49b-50b.

<sup>14</sup>53b.

<sup>15</sup>54b.

MR. KINNEY: You're not testifying?

THE DEFENDANT: I know.

MR. KINNEY: It's your right.

THE COURT: He's talking to his client. Okay, right. Fine.  
Let's have the jury.

Defendant's brother did testify that he was in the apartment, and, except for fifteen minutes when defendant went to the store, he was with and around his brother, and no sexual assault occurred.<sup>16</sup>

The defendant elected not to testify, and no reason for that decision appears on the record other than what is set forth above. The jury was instructed on defendant's right not to testify.<sup>17</sup>

Defendant was convicted of criminal sexual conduct in the second degree and appealed. The Court of Appeals affirmed in an unpublished opinion and stated in part as follows:

Defendant first contends that the court abused its discretion by refusing to suppress a portion of defendant's statement. Specifically, when questioned by police regarding how many times he had sex with the victim, defendant responded "I am taking the fifth on that one." The court's ruling was erroneous, because the prosecutor was not entitled to introduce evidence that defendant invoked his right to remain silent. *People v Rice (On Remand)*, 235 Mich App 429, 436-437; 597 NW2d 843 (1999). However, no reversal is warranted because defendant did not testify and the evidence was not admitted. See *People v Finley*, 431 Mich 506, 512; 431 NW2d 19 (1988). While defendant contends that the court's refusal to suppress the statement affected his decision whether to testify, this Court cannot assume that defendant decided not to testify out of fear of impeachment. *Id.* at 513. Moreover, in light of the overwhelming evidence of defendant's guilt, any error was harmless beyond a

---

<sup>16</sup>56b-74b.

<sup>17</sup>75b.

reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Defendant filed a delayed application for leave to appeal which this Court held in abeyance pending decision of *People v Dennis*.<sup>18</sup> This Court then ordered the briefing of the issue "whether the principles of *People v Finley*, 438 Mich 506 (1988), should apply in the circumstances of this case."

---

<sup>18</sup>464 Mich 567 (2001).

## ARGUMENT

### I.

**The Principles of *People v Finley*, which require defendant to testify and suffer impeachment by erroneously admitted evidence in order to preserve the error for appeal, ought to be applied where the erroneous ruling implicates federal constitutional rights contained within the Fifth and Fourteenth Amendments.**

#### A. Summary of Argument

On the morning of the trial, defense counsel sought in limine suppression of an answer by his client during police interrogation: "I am taking the fifth on that one." The trial judge erroneously ruled it admissible. Nothing more was said about the matter. The prosecutor did not introduce the statement. In fact, immediately before closing her case-in-chief, she sought and received a waiver of the production of the witness necessary to introduce such statement. No issue was presented to the judge about use of the statement of impeach.

Defendant did not testify. On appeal, for the first time, he claimed that the erroneous trial ruling with the threatened use of his invocation of the Fifth Amendment to impeach him compelled him to give up his right to testify, a claimed violation of the Fifth Amendment.

The Court of Appeals applied *People v Finley* and held the issue unpreserved. It ruled alternatively that error, if any, was harmless beyond a reasonable doubt.

Clearly, defendant did not preserve the issue raised on appeal. Yet the claim was raised. For virtually all the reasons announced in *Finley* for the adoption of a testimonial preservation requirement, this Court ought similarly to require it here.

First, no prejudicial error occurred, because defendant's statement was never introduced into evidence. Secondly, any harm is entirely speculative. However, defendant's direct claim of the erroneous evidentiary ruling becomes transmogrified to a claim that because of the burden on his Fifth Amendment right, his testimony was lost. This claim is raised despite not one scintilla of record evidence and in the face of a record which, if anything, inferentially refutes the claim.

It should be noted as well that while the ruling of the trial judge was erroneous, such error would occur only if the statement was admitted during the case-in-chief. The statement may have been properly admissible for impeachment depending on the content of defendant's testimony.

The allowance of such leveraged or derivative claims poses especially troublesome problems for any harmless error analysis. Technically, if a court posits the nexus between the evidentiary constitutional error and defendant's decision not to testify, it would have to find beyond a reasonable doubt that nothing this defendant could have testified to would have or could have created a reasonable doubt. This metamorphosis of error should not be allowed. The adoption of a testimonial preservation requirement would eliminate the problem as a matter of law and serve not only all the policy reasons advanced in *Finley*, but all interests under state statute.

Defendant's argument against the extension of *Finley* to the circumstances of this case is fallacious. First, the cases cited actually stand for the proposition that there is nothing in federal law which prohibits this Court from creating a testimonial preservation requirement in cases of constitutional dimension. Secondly, the core argument is that the creation of any preservation rule requiring testimony by an accused itself violates the Fifth Amendment, an argument made and rejected in *Finley*.

In this state, we have, in addition to court rules and rules of evidence created by this Court, a state statute which directly bears on the case. It bars relief for this defendant. Moreover, the creation of a testimonial preservation rule applicable to the circumstances of this case would be entirely consistent with that statute.

Finally, while the People have no objection that the application of such rule be prospective only, this defendant is entitled to no relief because he did nothing to preserve his claim. To cases pending on appeal, a two-part test (nexus and proffer of testimony) ought to be applied as was done previously in *People v Finley*.

#### **B. The Standard of review**

The issue upon which the Court ordered briefing, whether the principles of *People v Finley* ought to be applied to the circumstances of this case, will be reviewed de novo as a question of law. *People v Lukity*, 460 Mich 484 (1990); *People v Sierb*, 456 Mich 519 (1998).

The trial court's ruling on the motion in limine, while dealing with admission of evidence, will be reviewed de novo because it involves a preliminary question of law. *Ibid*.

The claim raised on appeal, that the possible use by the prosecution of defendant's invocation of his Fifth Amendment privilege to impeach defendant if defendant testified and therefore burdened the exercise of his right to testify, was never raised before the trial court and is unpreserved. The standard of review of such claim is plain error. *People v Carines*, 460 Mich 750 (1999).

#### **C. The nature of the trial error and the nature of the alleged constitutional violation.**

On the morning of the trial immediately preceding jury section, defense counsel sought *in limine* the suppression of the last question put to defendant in his interrogation and defendant's response, which was, "I am taking the fifth on that one." The prosecutor erroneously argued against

suppression, and the trial court ruled in favor of the prosecutor. Nothing more is contained in the record about this matter. The statement was never introduced into evidence, and the jury had no knowledge of it.

Three days later, the prosecutor, before resting her case, received from defendant a waiver of the production of certain endorsed witnesses, all police officers, one of whom was Officer Lena Edwards who had taken defendant's statement.

When the People rested, it should have been clear to all concerned that defendant's statement would not be put into evidence. The claim raised on appeal for the first time that defendant feared that if he testified he would be impeached with his assertion of the Fifth Amendment is quite simply contrived for the appeal and is not only wholly unsupported by the record, the record evidence tends to support a contrary inference.

There are clearly circumstances under which the statement would have been properly introduced to impeach, for example, had defendant testified that he tried to tell police what had happened and they were not interested in hearing it. Thus, whether such statement could have been used properly to impeach defendant's testimony would have depended on the content of defendant's testimony.

What is clear from the record is that defense counsel made no attempt to revisit the in limine ruling; he made no proffer of defendant's testimony; he made no statement that defendant would testify if the judge refused to allow impeachment with the statement. The statement is simply not mentioned, and, for good reason, for the witness necessary to admit it was no longer endorsed. As defense counsel had said: "So we don't need their testimony."

Defense counsel requested the lunch time recess to decide whether to call witnesses. It is clear from the record that defendant wished to have his brother testify and did not wish to personally testify. Nowhere in the record is his statement to the police mentioned. There is no nexus between the erroneous trial ruling and defendant's decision not to testify.

### **1. The Trial Error**

The statement of defendant containing invocation of the Fifth Amendment was erroneously ruled admissible. Had the evidence been introduced in the People's case-in-chief, it would have violated defendant's constitutional right to due process.<sup>19</sup> The defendant had been advised of his *Miranda*<sup>20</sup> rights and, by defense concession, had waived them. His invocation of his Fifth Amendment rights was insolubly ambiguous and may well have been based upon the warnings given and the implicit assurance that no penalty would be attached to their exercise.

No prejudice occurred based on the ruling because the People elected not to introduce defendant's statement.

### **2. The nature of the alleged constitutional violation**

Defendant, for the first time on appeal, claimed that the erroneous trial ruling penalized or burdened his Fifth Amendment right to testify<sup>21</sup> by subjecting him to impeachment by use of his statement.

No such claim was ever raised before the trial court, and the claim on appeal is simply unsupported by the record. Nevertheless, a comparison of the record in this case with the claim of

---

<sup>19</sup>*Doyle v Ohio*, 426 US 610, 619, 96 S Ct 2240, 49 L Ed 2d 91 (1976).

<sup>20</sup>*Miranda v Arizona*, 384 US 436, 86 Sct 1602, 16 Led 2d 694 (1966).

<sup>21</sup>*Rock v Arkansas*, 483 US 44, 107 S Ct 2704, 97 L Ed 2d 37 (1987).

a Fifth Amendment violation raised on appeal demonstrates the impelling need for adoption of a *Finley* principle requiring defendant's testimony in order to preserve for appeal an erroneous trial ruling respecting a *Doyle* violation.

#### **D. Why *Finley* principles should be applied**

The *Finley* Court advanced four major policy reasons for its adoption of the *Luce*<sup>22</sup> rule.

##### **1. Non-occurrence of error**

"In fact, the straightforward logic of *Luce* not grasped by either dissent is that as to evidentiary rulings, error does not occur until error occurs; that is, until the evidence is admitted."<sup>23</sup>

Of course, the claim of error goes through a metamorphosis: A claim of a Fifth Amendment violation by burdening the right to testify grows out of the now non-prejudicial erroneous in limine ruling. Claims of this type, that is, that a defendant's decision not to testify was caused by an erroneous trial ruling, are leveraged or derivative claims.

*Luce*, federally, and *Finley*, in Michigan, were precisely aimed at eliminating such claims. The rationale applies with equal force to an in limine ruling of constitutional dimension where the evidence is never admitted. No prejudicial error has occurred under *Doyle* until the evidence goes to the jury. It never occurred in this case.

##### **2. Any harm is speculative**

Until the evidence is actually admitted, at least three things could change. The trial judge could change his ruling and hold the evidence inadmissible; the prosecuting attorney could decide for whatever reason to simply not introduce the evidence; and the defendant may decide not to testify

---

<sup>22</sup>*Luce v United States*, 469 US 38, 105 S Ct 460, 83 L Ed 2d 443 (1984).

<sup>23</sup>*Finley*, *supra* at 512.

for reasons extraneous to the ruling. A close reading of the record in this case suggests that the later two things actually occurred.

In *Ohler v United States*,<sup>24</sup> the government moved in limine to use against defendant in a drug case a prior drug conviction for impeachment. The trial court ruled it admissible. Defendant, herself, introduced the conviction on direct examination "to take the sting out."

Held: Defendant failed to preserve the alleged error by herself introducing the evidence. It is only when the government introduces the evidence erroneously that a denial of a substantial right can be claimed. Until such time, any harm from the in limine ruling is speculative.

The three specific ways in which any harm from the ruling is speculative all apply with equal force to the instant case.

Moreover, it bears repetition here that defendant's statement, involving the Fifth Amendment may well have been properly admissible to impeach depending on defendant's actual testimony. The question of the use of the statement to impeach was never at any time raised during the trial.

### **3. Appellate review of the ruling**

*Finley* advanced as an important policy reason for adoption of *Luce* the need for a full record, including defendant's testimony, in order to evaluate whether the trial court ruled correctly on the impeachment issue. In order to review for an abuse of discretion the prejudice vs probative value determination, a full record would be helpful.

The People concede that this policy reason is inapposite in our case. Clearly, the trial court's ruling was erroneous as a matter of law. The *Doyle* decision has ruled that defendant's decision to invoke a right of silence has no probative value and, therefore, evidence of the exercise of such right

---

<sup>24</sup>529 US 753, 120 S Ct 1851, 146 L Ed 2d 826 (2000).

must be deemed prejudicial, that is, probative for an illegal or improper purpose. (Here the inference of guilt from silence).

Again, however, a very close reading of both *Finley* and *Luce* suggests that this rationale even in those cases was the least important of the four presented.

#### **4. Appellate review of harmless error**

The People contend that the most important policy reason supporting *Finley*'s adoption of *Luce* is the need for meaningful appellate review of the harmless error issue. *Finley*, at 513, quotes *Luce*, at 42:

Were in limine rulings under Rule 609(a) reviewable on appeal, almost any error would result in the windfall of automatic reversal; the appellate court could not logically term "harmless" an error that presumptively kept the defendant from testifying. Requiring that a defendant testify in order to preserve Rule 609(a) claims will enable the reviewing court to determine the impact any erroneous impeachment may have had in light of the record as a whole; it will also tend to discourage making such motions solely to "plant" reversible error in the event of conviction.

The Florida Supreme Court recently adopted *Luce* and stated:<sup>25</sup>

Lastly, any error regarding in limine rulings would result in automatic reversal, thus emasculating the doctrine of harmless error. On one hand the reviewing court would be unable to assess the harm; yet, the reviewing court could not label as harmless an error that presumptively kept the defendant from testifying.

It is true that the Court of Appeals stated below: "Moreover, in light of the overwhelming evidence of defendant's guilt, any error was harmless beyond a reasonable doubt."

It is suggested that application of harmless error doctrine to defendant's leveraged claim requires more. If one posits that the erroneous trial ruling caused defendant's decision not to testify

---

<sup>25</sup>*State v Raydo*, 713 So 2d 996, 1000 (Fla, 1998).

and that the claim may be preserved for appeal without testifying, an appellate court would have to find beyond a reasonable doubt that no testimony by this defendant could have created a reasonable doubt.

There is little reason to distinguish between evidentiary rulings with a constitutional dimension and those without one where the claim is that the erroneous ruling, impermissibly burdened defendant's Fifth Amendment right to testify.

## **E. Law in other jurisdictions**

### **1. *Luce-Finley***

The overwhelming majority of state courts has adopted *Luce* in requiring the testimony of the defendant to preserve for appeal an allegedly erroneous trial ruling on impeachment.<sup>26</sup> Among those refusing to squarely adopt *Luce*, most require for preservation of the error an adequate record basis, such as proof of a nexus between the ruling and defendant's decision not to testify in addition to an offer of proof.<sup>27</sup>

North Carolina was a leading jurisdiction refusing to adopt *Luce*. *State v Lamb*,<sup>28</sup> is prominently quoted in defendant's brief. However, in *State v Hunt*,<sup>29</sup> North Carolina squarely adopted *Luce*.

---

<sup>26</sup>"Procedural Rules Governing the Admissibility of Evidence," 54 Okla L Rev 513, 518-519 and footnotes 18-20 (2001).

<sup>27</sup>*Ibid.*

<sup>28</sup>84 NC App 569, 353 S E2d 857 (1987).

<sup>29</sup>123 NC App 762, 475 S E2d 722 (1996).

## 2. Extension of *Luce*

There is a split of authority among the states and among the federal courts of appeals on the extension of *Luce* beyond impeachment with prior convictions to other evidentiary rulings including those with constitutional dimensions.

The second and eleventh circuits have applied *Luce* to FRE 608(b).<sup>30</sup> The eighth circuit has applied it to uncharged misconduct evidence under FRE 404(b).<sup>31</sup> In *Bailey v United States*, 699 A 2d 392 (DC App 1997), the government sought to use defendant's alleged prior rape of a woman in defendants's current trial but only in rebuttal on the issue of consent if the defendant testified: Held, *Luce* applies.

Vermont has applied *Luce* to uncharged misconduct under VRE 404(b).<sup>32</sup>

Arizona squarely applied *Luce* in two cases involving constitutional questions. In *State v Conner*,<sup>33</sup> the trial court ruled that defendant's statement, while *Miranda* defective, could be used to impeach defendant if defendant testified. Then, on appeal in a death penalty case, defendant asserted that the erroneous ruling burdened his right to testify. The Supreme Court applied *Luce* and stated:<sup>34</sup>

---

<sup>30</sup>*United States v Weichert*, 783 F2d 23 (CA 2, 1986) (defendants's disbarment twelve years earlier); *United States v Dimatteo*, 759 F2d 831 (CA 11, 1985) (defendant sought ruling in limine precluding attack on his witness' credibility by extrinsic evidence; issue not reviewable because witness did not testify).

<sup>31</sup>*United States v Johnson*, 767 F2d 1259 (CA 8, 1985).

<sup>32</sup>*State v Koveos*, 732 A 2d 722 (VT, 1999).

<sup>33</sup>786 P2d 948 (Ariz 1990).

<sup>34</sup>*Id.*, at 953-954.

In addition, requiring defendant to testify prevents defendant from "cynically manufacturing a basis for a possible appeal by falsely alleging that the threat of impeachment alone deterred him from testifying." Westen & Mandell, To Talk To Balk, or to Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response." 19 Am.Crim.L.Rev.521, 552 (1982). Furthermore, this requirement ensures that the reviewing court is presented with an actual, rather than hypothetical injury.

*Connor* was followed two years later by *State v Conde*.<sup>35</sup> Here, the trial judge ruled that defendant's statement was involuntary, but could nevertheless be used to impeach.<sup>36</sup> The Court of Appeals stated:

While the issue in *Connor* was a constitutional one, Arizona adopted the *Luce* rule: Although a defendant's statements were obtained in violation of Miranda, his election to forego testifying obviates any challenge to the ruling on use of the impeachment evidence. Conde's claim that his second statement was the product of the allegedly coercive first interrogation involves the same analysis and result. All of the policy reasons for declining to consider his claim in the absence of his testimony apply whether the statement was coerced or as in *Connor*, obtained in violation of Miranda. In either situation, Conde's alleged prejudice is hypothetical because his testimony could not be impeached because it did not occur.

New Hampshire has extended *Luce* to unconstitutionally obtained statements. In *State v Bruneau*,<sup>37</sup> the trial court ruled that the taking of a statement violated *Edwards v Arizona*,<sup>38</sup> but

---

<sup>35</sup>846 P2d 843 (Ariz, 1992).

<sup>36</sup>this is clearly erroneous. *Mincey v Arizona*, 437 US 385, 98, Sct 2408, 57 LED2d 290 (1978).

<sup>37</sup>552 A2d 585 (NH, 1988).

<sup>38</sup>451 US 477, 101 Sct 1880, 68 LED2d 378 (1981).

nevertheless would be usable for impeachment if defendant testified. Against defendant's claim that the ruling prevented him from testifying, Justice Souter writing for a unanimous court stated:<sup>39</sup>

Second, assuming *arguendo* that the defendant raised an issue involving post-indictment State and federal rights to counsel, we find the claim of prejudicial error too speculative for adjudication. The defendant never testified and was never impeached. We have no way of knowing whether his decision to remain off the stand was influenced to any degree by the ruling *in limine*, any more than we can tell what would have happened if he had testified. We do not know whether his testimony would have differed from the substance of his statement, or whether the State would actually have used the statement to impeach him.

The record, indeed, is not only devoid of any basis to infer that the defendant was prejudiced, but is in fact suggestive of just the opposite. It will be remembered that the statement was an exculpatory one, denying the killing. The defendant has never claimed that the statement was untrue, or that he would have a different exculpatory story if he had taken the stand. There, is then, on balance, more reason to infer that the possibility of impeachment by use of the statement had nothing to do with the defendant's decision to remain silent, than there is to suggest otherwise.

In any event, because of the defendant's total inability to show any connection between the trial court's ruling, the defendant's decision, and any ensuing prejudice, we hold the *in limine* ruling inadequate to present an issue on appeal. Only if the defendant had taken the stand and suffered impeachment by the statement's use would an issue be ripe for adjudication here. *Accord State v LaRose*, 127 N.H. 146, 150, 497 A.2d 1224, 1228 (1985) (no inquiry into possible prejudice from ruling allowing State to impeach by prior conviction where defendant does not take stand); *Luce v United States*, 469 U.S. 38, 43, 105 S.Ct. 460, 464, 83 L.Ed.2d 443 (1984).

In *Jordan v State*, 591 A.2d, 875 (Md., 1991), a trial judge ruled a juvenile's confession voluntary but defective in that the state failed to prove a waiver of the right to counsel. Thus, the statement was usable only to impeach. While the defendant did not testify, he did everything else

---

<sup>39</sup>552 A.2d at 592.

that could be done to preserve the alleged error, including revisiting the in limine ruling and guaranteeing that defendant would testify if only the court would suppress his statement. In addition, the facts appear to suggest that the statement was in fact involuntary. The court stated, at 878:

Just as Jordan's potential injury is speculative, the right he is asserting is also speculative. If we assume Jordan is correct and the trial judge erroneously ruled that the confession was voluntary, then it is not clear how Jordan's constitutional rights were violated. His right against self-incrimination was not infringed upon, as he elected not to testify. His right to take the witness stand could ultimately be preserved since, if he testified and was improperly impeached with an involuntary statement, any conviction would be reversed on appeal. What Jordan really seems to be asking for is that, when a trial judge improperly rules that an involuntary confession can be used to impeach, the defendant ought to be able to avoid the effect of the ruling by not taking the stand, but still have his conviction reversed because evidence that ultimately was never introduced should not even have been available for introduction.

### **3. The other side**

In *State v Brings Plenty*, 459 NW2d 390 (SD, 1990), the Supreme Court of South Dakota ruled *Luce* would not be applied where the trial judge found a statement involuntary but nevertheless ruled it admissible to impeach even though defendant elected not to testify. Held: Because the statement was involuntary, it was a violation of due process to rule it usable for impeachment.

And, in *State v Brunelle*, 534 A2d 198 (VT, 1987), the Supreme Court of Vermont stated, at 202:

We believe that admission of previously suppressed evidence to impeach credibility implicates a defendant's constitutional right to testify in his own defense. The defendant must choose between not testifying, and thus foregoing the opportunity to present his account of the incident, or testifying, and running the risk of being impeached with illegally obtained evidence. Despite the fact that a defendant may still elect to testify, the risk of admission of previously suppressed evidence to impeach credibility produces a chilling effect

on the exercise of that right, and, as a result, acts as "a penalty imposed by courts for exercising a constitutional privilege." *Griffin v California*, 380 U.S. 609, 614, 85 S.Ct. 1229, 1232-33, 14 L.Ed.2d 106 (1965).

The seventh and ninth federal circuits have refused to extend *Luce* to use of confessions claimed to have been involuntary where the ruling allows use for impeachment.<sup>40</sup>

Finally, in a case with very complex facts, the second circuit reversed a conviction in habeas and refused to apply *Luce*.<sup>41</sup> In trial #1, defendant was convicted in part on the basis of compelled testimony (testimony under grant of immunity before a grand jury, but nevertheless used at a subsequent trial). While an appeal of #1 was pending, defendant was charged in #2. He moved to suppress the conviction in #1; the trial court ruled it admissible only to impeach, and the defendant did not testify and was convicted. Later, the conviction in #1 was reversed and the case dismissed. The second circuit, on habeas, reversed the second conviction finding defendant's right to testify to have been burdened by the threat to impeach with an unconstitutional conviction obtained with compelled evidence.

---

<sup>40</sup>*United States v Chischilly*, 30 F3d 1144 (CA 9, 1994) (defendant claims his statement was involuntary because of mental impairment; trial court rules it *Edwards* violative but usable for impeachment because voluntary; defendant does not testify; defendant appeals claiming he was forced to forego his insanity defense because of government's threatened use of statement in rebuttal. Held: *Luce* does not apply because there is a constitutional claim; however, upon review of the claim, the conviction was affirmed.) While *Chischilly* appears to be the authority most followed in the 9<sup>th</sup> Circuit, there is contrary authority: *United States v Sherwood*, 98 F3d 402, 409 (CA 9, 1996); *United States v Behanna*, 814 F2d 1318 (CA 9, 1987).

*United States ex rel Adkins v Greer*, 791 F2d 590, 593-594 (CA 7, 1986) (confession ruled *Edwards* violative but voluntary; defendant does not testify. Held: *Luce* does not apply because any use of an involuntary statement would violate the constitution; however, upon review of the claim, the conviction was affirmed.

<sup>41</sup>*Biller v Lopes*, 834 F2d 41 (CA 2, 1987).

#### **4. Proposed change to Federal Rules of Evidence**

In August of 1999, the United States Judicial Conference published proposed amendments to the Federal Rules of Evidence. One amendment to Rule 103 would have incorporated and extended the reach of *Luce*: "if under the court's ruling there is a condition precedent to admission or exclusion, such as the introduction of certain testimony or the pursuit of a certain claim or defense, no claim of error may be predicated upon the ruling unless the condition precedent is satisfied."

At least as of January 20, 2003, the proposed amendment had not been adopted. For a long article criticizing the proposal, see "Appellate Review of In Limine Rulings," 182 FRD 666 (1999). The People do not agree with Professor James Joseph Duane's hyperbolic criticism of *Luce*, but the article is cited in order to give all members of this Court all information to assist its decision no matter which way the information cuts.

#### **F. Fallacies in defendant's argument**

##### **1. The case law**

Defendant relies heavily in his brief on three cases, and the People contend the cases do not stand for the propositions advanced.

In *New Jersey v Portash*,<sup>42</sup> the defendant had testified before a grand jury under a grant of immunity guaranteeing no use of the testimony except for a prosecution for perjury. Upon his indictment, the trial judge ruled the defendant could be impeached with his grand jury testimony if it were inconsistent with his testimony at trial. As a result, defendant refused to testify. He was convicted, and, upon appeal, the conviction was reversed.

---

<sup>42</sup>440 US 450, 99 Sct 1292, 59 L Ed 2d 501 (1979).

The state was granted certiorari. The state argued that because defendant did not testify and his grand jury testimony was thus never used unconstitutionally, the constitutional question was never presented.

While the holding of the Supreme Court was 7-2 on the principle that the use of immunized testimony to impeach a criminal defendant violates the Fifth Amendment, it is critical to see how the Court reached that result.

Against the claim that the issue was hypothetical because defendant did not testify, three justices held that because the trial judge ruled on the merits of the constitutional question and because the state appellate court necessarily ruled that the issue was preserved under New Jersey procedure despite defendant's not taking the stand, the Supreme Court had an actual controversy before it.

Two justices thought the case was really resolved by New Jersey law, but joined the Court's result.

Two justices noted that the preferred procedure is to require a defendant to testify especially to avoid bogus claims on appeal, but since New Jersey allowed preservation of the claim, nothing in federal law prevented New Jersey from so doing.

Two justices dissented on the ground that because defendant had not testified, the prohibited use of compelled testimony to impeach had not occurred. Regardless how New Jersey treated the issue of the in limine trial court ruling, there simply was no federal claim within the jurisdiction of the Supreme Court.

Properly understood, *Portash* is no authority supporting defendant's position. It really stands for the proposition that if Michigan extends the *Finley* preservation requirement (defendant's

testimony) to cover the case before the Court (and, perhaps, to all cases in which the leveraged claim is raised: the defendant suffered a burden on his right to testify by an erroneous trial ruling), there would be no violation of federal law.

Furthermore, at the time that *Portash* was decided, any use of compelled testimony or of a coerced confession would have constituted automatic error not subject to harmless error analysis further obviating the need for defendant's testimony. This changed with *Arizona v Fulminante*.<sup>43</sup>

The second case the defendant relies upon is *Brooks v Tennessee*.<sup>44</sup> Here, a state statute required a defendant who wished to testify to do so first. Defendant requested the right to go later, and the prosecutor agreed. The trial court refused the request, and, as a result, defendant was not allowed to testify.

This case is simply inapposite to any issue before this Court. There was no true preservation issue, since defendant was precluded from testifying, a direct violation of the Fifth Amendment.

---

<sup>43</sup>499 US 279, 111 S Ct 1246, 113 L Ed 2d 302 (1991). This case, while not truly germane to the issues before the Court in our case, bears some detailing for the sometimes troublesome nature of harmless error application. The defendant killed his daughter. He left the state and was later imprisoned in New York. A paid FBI informant used defendant's fear of violence from other inmates and promised protection if the defendant would tell him the truth about the rumor of the killing. Fulminante confessed to the informant. Later, he was tried in Arizona for the murder and sentenced to death. The state Supreme Court reversed. On appeal by the state, the following opinions were announced. Four Justices held: 1) the confession was coerced; 2) admission of a coerced confession can never be harmless; and 3) even if subject to harmless error analysis, the introduction of the confession was not harmless. Three Justices held: 1) the confession was voluntary; 2) nevertheless, if held to be coerced, harmless error is available; and 3) admission of the confession was harmless error. Justice Scalia held: 1) the confession was coerced; 2) harmless error doctrine applies; and 3) the error was harmless. Justice Kennedy held: 1) the confession was voluntary; 2) harmless error applies; but 3) since 5 Justices held the statement coerced, even though Justice Kennedy thought its admission proper, he could not say beyond a reasonable doubt that it did not contribute to the verdict. Thus, 5-4, the confession was coerced; 5-4, harmless error applies; and 5-4, the error was not harmless.

<sup>44</sup>406 US 605, 92 S Ct 1981, 32 L Ed 2d 358 (1972).

*Brooks* deals with a state's attempt to regulate by statute the direct exercise of defendant's right to testify or not testify. It has nothing to say about the raising of derivative or leveraged Fifth Amendment claims based upon an erroneous in limine trial court ruling. In cases such as the instant case, the defendant creates his own Fifth Amendment claim by refusing to testify and subsequently claiming that the erroneous trial ruling compelled his decision. Nothing in federal law prevents the state from prohibiting the claim altogether by creating a testimonial preservation requirement for the direct error alleged.

Finally, defendant cites *People v Bobo*.<sup>45</sup> There simply is nothing left to *Bobo*, apart from *Doyle v Ohio*.<sup>46</sup> A defendant may be impeached with pre-arrest silence,<sup>47</sup> post-arrest silence (if no *Miranda* warnings have been given),<sup>48</sup> and even after *Miranda* warnings, if the invocation of a right contradicts defendant's trial testimony.<sup>49</sup> It is clear in this state since *People v Cetlinski* that, apart from *Doyle*, whether silence may be used in evidence will depend on the inferences which may rationally be drawn from the silence.

## **2. Other Arguments**

Defendant argues that to date *Finley* has been limited to claims of error regarding introduction of evidence of prior convictions. First, that is a misreading of the holding in this case

---

<sup>45</sup>390 Mich 355, 212 NW2d 190 (1973).

<sup>46</sup>426 US 610, 96 S Ct 2240, 49 L Ed 2d 91 (1976).

<sup>47</sup>*Jenkins v Anderson*, 447 US 231, 100 S Ct 2124, 65 L Ed 2d 86 (1980).

<sup>48</sup>*Fletcher v Weir*, 455 US 603, 102 S Ct 1309 71 L Ed 2d 490 (1982).

<sup>49</sup>*People v Cetlinski*, 435 Mich 742 (1990); *Doyle v Ohio*, supra, at fn11 (majority) and fn 1 (dissent) (all nine Justices agreeing).

by the Court of Appeals. Secondly, there are several unpublished opinions in the Court of Appeals extending *Finley* to other analogous issues. These cases are not cited in the People's Brief because they are not necessary to a resolution of the issue herein.

But far more important is the moral force of defendant's argument. Properly understood, defendant claims that application of the *Finley* preservation requirement to the hypothetical *Doyle* error in the trial court's in limine ruling would violate the Fifth Amendment. Defendant claims the Fifth Amendment prohibits a testimonial preservation rule because such a rule itself would compel a defendant to testify to preserve a claim which would then itself directly violate the Fifth Amendment. This argument is simply a restatement of Justice Cavanagh's dissenting opinion in *Finley*. It is an argument that both *Luce* and *Finley* were wrongly decided and that testimonial preservation requirements themselves violate the Fifth Amendment.

The argument is simply unsound at its core. The essence of any leveraged Fifth Amendment claim simply ignores that no prejudicial error has occurred until evidence erroneously goes before the fact-finder. Unless the defendant testifies, no prejudicial error can occur. If he testifies and the hypothetical, speculative claim becomes real by impeachment, the error occurs for the first time, is preserved, and can be quantitatively assessed.

The wisdom and beauty of *Finley* was its direct elimination of leveraged claims where the subject matter is use of prior conviction for impeachment. While both *Luce* and *Finley* took pains to assert that no constitutional claim was involved, that is simply untrue. The direct error alleged, that is, the ruling erroneously admitting evidence of prior criminal convictions, is not necessarily a constitutional error; however, the leveraged claim, its impact on defendant's decision whether to testify, clearly is a derivative Fifth Amendment claim. *Finley* ruled, as a matter of law, that no such

claim would again be allowed in Michigan; at least where the predicate error involves erroneous introduction of prior criminal convictions.

There simply is no sound reason not to apply the wisdom of *Finley* to leveraged claims where the direct claim involves an evidentiary ruling of constitutional dimension. To do otherwise is to allow a hypothetical *Doyle* violation, subject to harmless error analysis,<sup>50</sup> to be converted derivatively into a violation of the Fifth Amendment where the effect is to eliminate or severely hamper accurate harmless error analysis.

On the record in this case, such a result would be preposterous. Here, the claim raised on appeal for the first time was never put before the trial judge; there was no nexus between the erroneous trial ruling and the defendant's decision not to testify; there was no offer of proof about defendant's testimony; there was no request to revisit the ruling of the trial court to ascertain whether the invocation of silence could be used to impeach if defendant testified; the endorsed witness necessary to authenticate defendant's interrogation had been waived; and, finally, the record suggests that the erroneous trial ruling was no factor bearing on defendant's decision not to testify.

Nevertheless, the claim is presented on appeal for the first time. Both *Luce* and *Finley* declared policy reasons why such claims are disfavored. This case is a "poster-child" as to why *Finley* principles ought to be applied to the circumstances of this case. All leveraged or derivative Fifth Amendment claims, deriving from erroneous trial rulings which defendant claims will harm him if he testifies, ought to be eliminated.

---

<sup>50</sup>*United States v Hasting*, 461 US 499 103 SCt 1974, 76 L Ed 2d 96 (1983) (really a Fifth Amendment violation by improper comment on defendant's silence at trial).

## G. A Comparison of Harms

Judge Easterbrook recently opined in a habeas case involving a murder conviction:<sup>51</sup>

During closing argument, the prosecutor twice alluded to the fact that Aleman had not testified. According to the prosecutor, Aleman was "the only one in this room who didn't come on this witness stand and talk about accepting responsibility" as others involved in the shooting had done. Aleman's lawyer objected, and the judge sustained the objection. Later, when discussing evidence that three shots had been heard (though only two bullets struck Billy Logan, the victim), the prosecutor asked the jury to infer that Aleman had fired three times: "either he shot at the dog or he shot at Bobby Lowe, or even perhaps ...[he shot] again at Billy Logan and missed. We don't know. Harry Aleman knows. We don't know." Aleman's lawyer did not object to this statement. The court instructed the jury that Aleman was not required to testify and that his decision not to do so "must not be considered by you in any way in arriving at your verdict." This instruction shows the gap between what happened in Aleman's trial and what happened in *Griffin v California*, 380 U.S. 609, 85 SCt 1229, 14 L Ed 2d 106 (1965), where the jury was told that it could draw an adverse inference from the accused's failure to testify. What *Griffin* condemns is equating silence with evidence of guilt, which undermines the privilege against compulsory self-incrimination. Reminding jurors of something they already know – that the defendant did not testify – could be a back door invitation to draw the forbidden inference, but when it is not there is no constitutional problem. See *United States v Robinson*, 485 U.S. 25, 108 SCt 864, 99 L Ed 2d 23 (1988) (recognizing a distinction between an adverse inference and a simple reference to silence); *Portuondo v Agard*, 529 U.S. 61, 69, 120 SCt 1119, 146 L Ed 2d 47 (2000) ("*Griffin* prohibited comments that suggest a defendant's silence is 'evidence of guilt'" (emphasis in original)). Cf. *Greer v Miller*, 483 U.S. 756, 107 S Ct. 3102, 97 L.Ed.2d 618 (1987) (instruction to jury not to draw any inference from silence means that prosecutor's quest for such an inference has been thwarted, and no constitutional error has occurred).

\* \* \*

---

<sup>51</sup>*Aleman v Starnes*, 320 F3d 687 (CA 7, 2003).

The state's court of appeals did not mention *Chapman* because it apparently did not think that the federal Constitution had been violated. It applied a state-law standard of harmlessness to what it saw as an error of state law by the prosecutor. Given the trial judge's anti-inference instruction, this is an appropriate perspective. Even if the instruction were deemed inadequate, and even if the prosecutor's argument were treated as an implied request to use Aleman's silence as substantive evidence against him, that fleeting argument was so peripheral to this trial that no substantial and injurious result came to pass. We are confident that the jury convicted Aleman based on the evidence actually introduced, not on speculations about the significance of missing testimony.

As noted above in *Greer*, even where the prosecutor has asked in the presence of the jury a *Doyle*-violative question, the sustaining of an objection and the giving of a curative instruction means there is no error.

And recently in *People v Dennis*,<sup>52</sup> where a police detective testified that defendant exercised his right to counsel before answering any questions where the answer was in response to an open-ended question unintended to elicit the response, this Court held that in light of the curative instruction, no violation of *Doyle* had occurred. The Court of Appeals had treated the matter as a preserved constitutional error subject to a harmless beyond a reasonable doubt standard and reversed the conviction.

If in all three cases, there is either no error or harmless error, where in each case statements were made in the presence of the jury, such holdings being based upon the fact that no jury was asked to draw the inference prohibited by *Doyle*, then how can the trial court's erroneous in limine ruling where defendant's statement never went before the jury possibly be the predicate for reversible error?

---

<sup>52</sup>464 Mich 567, 628 NW2d 502 (2001).

The answer to that question is only if this Court rules that the leveraged claim of a violation of defendant's Fifth Amendment privilege self-generated by defendant's own decision not to testify is allowed to be raised. This Court ought to rule to the contrary and impose a testimonial preservation requirement on the defendant in order to preserve alleged errors in evidentiary rulings made in limine even where such rulings are of constitutional dimension.

#### **H. Application of the new rule**

Defendant argues in his brief that even if this Court should rule that *Finley* principles should be applied to the circumstances of this case, the rule should be purely prospective and not apply to this defendant. Prescinding from whether such a procedure would run afoul of the ban against advisory opinions, there simply is no reason for this defendant to receive such favorable treatment in light of the fact that he did absolutely nothing at trial to preserve the alleged constitutional error raised on appeal for the first time. There simply is no claim in this record supporting a nexus: there is absolutely no claim that his decision not to testify was in any way influenced by the erroneous *Doyle*-violative in limine ruling.

*Finley*, however, suggests an analogue. The *Finley* opinion, at 524-525, sets forth the developing preservation law pre-*Finley*. In general, that law adopted the test set forth in *United States v Cook*:<sup>53</sup> 1) a nexus-proof that the ruling caused defendant not to testify including a clear statement that defendant would testify if the evidence were excluded; and 2) a proffer of defendant's testimony.

---

<sup>53</sup>608 F2d 1175, 1186 (CA 9, 1979) (en Banc).

And, in *People v Wakeford*,<sup>54</sup> this Court had noted *Cook* and commented favorably, but faced with a claim that the erroneous ruling on prior convictions had caused the loss of defendant's testimony, ruled that absent a proffer from defendant, the harm was speculative.

Chief Justice Riley then discussed federal<sup>55</sup> and state<sup>56</sup> principles used to determine the issue of retroactivity. She ruled that since defendant did nothing to preserve the issue, the ruling would apply to him, but she otherwise applied *Finley* prospectively for the testimonial preservation requirement. However, the two-factor *Cook* test was adopted for all cases pending on appeal at the time of decision.<sup>57</sup>

In light of the split of authority among federal and state courts on the extension of *Luce-Finley* to issues of constitutional dimension, the rationale of *Finley* seems appropriate. Accordingly, the People would have no objection that the new rule creating a testimonial preservation requirement to prevent all leveraged or derivative claims that a violation of the Fifth or Fourteenth Amendments occurred because defendant was compelled to give up his right to testify by fear of impeachment evidence being erroneously introduced be applied prospectively; that defendant lose his claim because it was never preserved; and that, in all cases pending on appeal, the two-part *Cook* test be applied, that is, establishment of a nexus and a proffer of testimony.

## **I. State Law**

MCL 769.26 provides that:

---

<sup>54</sup>418 Mich 95, 341 NW2d 68 (1983).

<sup>55</sup>*Chevron Oil Co. v Huson*, 404 US 97, 92 S Ct 349, 30 L Ed 2d 296 (1971).

<sup>56</sup>*People v Nixon*, 421 Mich 79, 364 NW2d 593 (1984).

<sup>57</sup>That portion of the court's ruling was, however, supported by only three votes.

No judgment or verdict shall be set aside or reversed or a new trial granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

MCR 2.613(A) provides:

An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

MRE 103(a) provides:

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."

When one reviews Michigan's statutes, court rules, and rules of evidence, one is struck by their common theme in requiring the application of a harmless error rule.

It may be that the existence of the three state law cited rules does not compel this Court to adopt a testimonial preservation requirement, but they clearly compel this Court to rule that defendant loses on his claim of appeal.

To suggest based on this record that the in limine ruling compelled defendant not to testify out of fear of impeachment and that such self-generated decision violated his own Fifth Amendment right to testify is not only contrived for the appeal and bogus, it is an insult to the intelligence of a rational legal mind.

Is it conceivable that any rational jurist could describe what happened to this defendant as a miscarriage of justice? The question is rhetorical.

Nevertheless, leveraged claims such as this will continue to be advanced as long as this Court allows it. This Court can end the process by adopting a testimonial preservation requirement, and the Court ought to do so. The adoption of such a requirement will promote the very interests sought to be protected by the Statute.

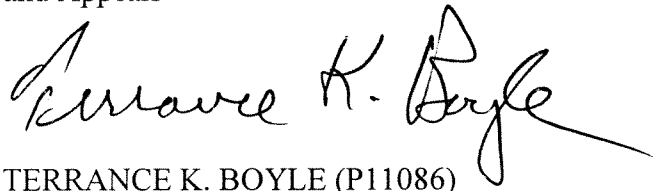
**RELIEF**

WHEREFORE, this Honorable Court should affirm the judgment of the Court of Appeals affirming defendant's conviction and sentence.

Respectfully submitted:

MICHAEL E. DUGGAN  
Wayne County Prosecutor

TIMOTHY A. BAUGHMAN  
Chief, Research, Training  
and Appeals

A handwritten signature in black ink, reading "Terrance K. Boyle". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

TERRANCE K. BOYLE (P11086)  
Deputy Chief, Appeals  
1441 St. Antoine, 11<sup>th</sup> Floor  
Detroit, MI 48226  
(313) 224-5794

Dated: April 24, 2003  
TKB/js